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No. 94-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW, AND KIMBERLY J. ENDERSON,

Appellants,

v.

OLIVER NORTH FOR U.S. SENATE COMMITTEE, INC., REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,

Appellees.

On Appeal from the United States District Court for the Western District of Virginia

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

PAMELA S. KARLAN
Counsel of Record
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4614/1110 (Fax)

EBEN MOGLEN
Columbia Law School
435 West 116th Street
New York, NY 10027
(212) 854-8382/7946 (Fax)

GEORGE A. RUTHERGLEN
580 Massie Road
Charlottesville, VA 22903
(804) 924-7015/7536 (Fax)

DANIEL R. ORTIZ
University of Southern California Law Center
University Park
Los Angeles, CA 90089
(213) 740-2559/5502 (Fax)

Attorneys for Appellants

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INTRODUCTION

Appellees, the Republican Party of Virginia and the Albemarle County Republican Committee (hereafter "RPV" or "Party"), concede, as they must, that the Party chooses delegates to its state nominating convention through "election." Motion to Dismiss or Affirm at 2. They acknowledge for purposes of this lawsuit, again as they must, that any registered voter who affirms allegiance to the Party's nominee and pays a registration fee is entitled to attend the convention and once there can vote as he or she sees fit. *Id.* Finally, they admit that the Party has changed, and contemplates future changes in, the registration fees charged to voters who wish to be "elected" as delegates. *Id.* at 20.

These concessions make clear that the district court's decision cannot stand. The Voting Rights Act expressly applies to *any* election with respect to candidates *for party office*, 42 U.S.C. § 1973*l*(c)(1). Delegates to a party convention are clearly covered: the legislative history of § 5 squarely states that "*an election of delegates to a State party convention would be covered by the Act.*" H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Cong. Code & Ad. News 2437, 2464.

The Party's Motion seeks to obscure this obvious outcome with a tissue of legal and factual misrepresentation.[1]

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[1] Throughout their Motion to Dismiss or Affirm, the Party refers to appellants as "the Law Students," apparently to suggest to the Court that this case is based on "hypothetical, abstract, or pedagogical interests." Motion to Dismiss or Affirm at 21. But it is precisely citizens with limited budgets, like law students, who are deterred from participating or are unfairly burdened by the imposition of a sizeable registration fee. The RPV's brief ignores law students' long history of vindicating their civil rights before this Court. *See, e.g., Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *cf. Dunn v. Blumstein*, 405 U.S. 330 (1968) (registered voter who was a law professor successfully challenged

The Party ignores the procedural posture of the case -- before this Court on a Rule 12(b)(6) motion to dismiss -- and disputes facts that must be accepted as true. It misconstrues and distorts the case law. And it airily suggests that its contested exaction of a filing fee from appellant Morse is moot, despite its keeping that fee and its announced intention to continue the practice of charging, and changing, registration fees. Failing to meet the central issues of the case, appellees have apparently conceded that these issues are worthy of plenary review by this Court.

I. Section 5 of the Voting Rights Act Clearly Reaches Changes in Party Rules Governing the Nomination of Candidates to Federal Office

As the Jurisdictional Statement shows, the language, legislative history, administrative interpretation, and case law of § 5 have always required preclearance of party rules related to electing candidates to party office and nominating candidates for public office. *See* Juris. St. at 8-11, 13-14. Section 5 has consistently been applied to party rules that provide alternatives to nominating candidates through formal primaries. See Juris. St. at 10 (citing case law and administrative practice).

The RPV counters this consistent application of § 5 with reliance on the sole exception -- *Williams v. Democratic Party of Georgia*, No. 16286 (N.D. Ga. Apr. 6, 1972), *summarily aff'd*, 409 U.S. 809 (1972). An honest reading of *Williams*, however, shows that the RPV and the court below seriously misconstrued the case. *Williams* recognized that

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Tennessee's durational residency requirement). In any event, appellants' status as law students is irrelevant to their right to participate in a fair and legal political process, and the Party did not deny appellants' qualifications to bring this lawsuit in its answer to the complaint.

Congress intended § 5 to reach the rules governing the election of delegates to state party conventions -- the practice challenged in this case. *Williams* slip op. at 4. But the *Williams* court reluctantly concluded that preclearance could not be required because no procedure then existed to enable political parties to submit changes for preclearance.[2] Whatever may have been true in 1972, current Department of Justice regulations contain exactly such a mechanism. *See* 28 C.F.R. § 51.23(b) (1993) ("A change effected by a political party (see § 51.7) may be submitted by an appropriate official of the political party."). Thus, the factual predicate on which the *Williams* court rested its entire holding no longer exists. *Williams* would be decided in appellants' favor today. There is, in short, no legal authority for the RPV's construction of § 5.

But the RPV does not simply misconstrue the law; it misapplies the facts as well. The facts alleged by appellants must be taken as true at this stage of the litigation. Qualified voters are "elected" as delegates; as a practical matter any voter who pays the Party's fee and signs a loyalty pledge can be elected; and delegates "cast votes" at the State Convention, which is essentially a mass meeting. Complaint ¶¶ 13-15. Two characterizations of these facts are possible: (1) the RPV operates a de facto primary; (2) the RPV's rules require the election of delegates to a state convention. On either characterization, § 5 covers the RPV's rules.

The RPV's argument -- that at the convention no

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2 "[I]f the Act applied to the rules and regulations promulgated by the State Party, there would be no way for the State Party to gain the required federal approval." Slip op. at 5. Of course, under the present regulations, there *is* a procedure for submission by a political party, *see* 28 C.F.R. § 51.23(b), and contrary to the *Williams* court's assumption, sole responsibility is *not* placed in the state's chief legal officer, *see* 28 C.F.R. § 51.23(a).

"voting" occurs because as a formal matter the voters are "delegates" to a "convention" -- disputes the first proposition only to concede the second. If the convention involves elected delegates -- and the RPV's own papers repeatedly refer to the "election" of delegates, *see* Motion to Dismiss at 2; Juris. St. at 17-18 (citing statements regarding the election of delegates in prior papers filed by the RPV) -- then the clear consequence of the RPV's *own factual assertions* is that preclearance is required for changes in the rules restricting eligibility for election to the position of delegate to those who pay a fee. The RPV concedes that it has repeatedly changed those rules, and that the present $45 fee has never been precleared.

The RPV's characterization of its process as a convention is irrelevant. It can hardly be disputed that the decision to replace a primary election by a convention, or the reverse, is covered by § 5. *See* Juris. St. at 15.[3] The RPV maintains nonetheless, and the district court agreed, that having once chosen to abandon primary elections and institute

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[3] Perhaps the RPV means to dispute even this undoubtedly settled proposition. It asserts that there is no state involvement in their activities because appellants have misconstrued the relevant state statutes. *See* Motion to Dismiss at 9. This proposition is absurd. Section 24.2-511 accords the Virginia Republican Party preferential access to the general election ballot for its nominees. This is the same state involvement in the candidate selection process found in *Smith v. Allwright*, 321 U.S. 649 (1944), in which appellees concede that state action was properly found.

The RPV made precisely such a change in 1994, altering its rules from those of 1990, which called for a primary. Preclearance was not sought, forming part of the gravamen of appellants' complaint. The RPV's contention that this issue was not raised below is specious. Had the party used a primary, it clearly could not have imposed a fee on voters who wished to participate. A challenge to the party's decision to impose a fee clearly embraces the party's decision to use a nominating method that involves such a fee.

a "convention" of whatever type, appellees were free of all further preclearance obligations.

This fallacy of this reasoning is evident. No meaningful federal oversight would be possible if parties had only to recast their primaries as conventions, reimposing restrictions on participation that would not have met the scrutiny of the Attorney General. The disgraceful "white primary" schemes condemned under the Fifteenth Amendment in *Smith v. Allwright* and *Terry v. Adams*, 345 U.S. 461 (1953), would escape the reach of § 5 under this interpretation--a result which appellees baldly assert is in keeping with congressional intent, despite unquestionable evidence to the contrary.

The RPV's interpretion of § 5 is completely at odds with the Attorney General's administrative interpretation of the Act, which is entitled to "considerable deference." *See* Juris. St. at 9. Appellees' obfuscatory maneuvering around this issue requires them to treat an example from 28 CFR § 51.7 as a limitation on the scope of the entire regulation, in a fashion entirely inconsistent with the Justice Department's interpretation of its own regulation. *See* Juris. St. at 10-11.

The district court's decision is wrong for a simple reason: it proves too much. If, for example, the Party had conditioned participation in the state convention or local meetings to elect delegates on a voter's race, or had established different fees for delegates based upon the candidate supported, the district court's logic would still result in a holding that the rule was not subject to § 5 preclearance. That clearly cannot be the law. There is no evidence whatever that Congress intended such a result, and appellees' argument is a lengthy digression intended to lead away from that simple fact.

The RPV's reliance on *Presley v. Etowah County*

Commission, 112 S.Ct. 820 (1992), is particularly unjustified. The internal operations of the county commissions at issue in that case are in no sense comparable to the simple fee imposition challenged here. *Presley* itself recognizes that if the defendant jurisdiction had "alter[ed] or impose[d] ... candidacy qualifications or requirements" or had changed "the composition of the electorate," preclearance would have been required. 112 S.Ct. at 829. That is *precisely* what appellants in this case challenge -- the imposition of a filing fee as a qualification for candidacy as a delegate and the exclusion from the Republican electorate of voters who cannot or will not pay a $45 fee to participate. Far from undermining appellants' arguments, *Presley* shows the continued vitality of § 5's coverage of the changes challenged here.[4]

II. The RPV's Constitutional Argument Is Meritless

The RPV defends the judgment below on the alternative ground that applying the Voting Rights Act to political parties

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[4] The Party's reliance on *O'Brien v. Brown*, 409 U.S. 1 (1972), is equally unavailing. The RPV seems to think that *O'Brien* provides authority for the proposition that the Voting Rights Act has no application to conventions. But this Court ultimately dismissed the petition for certiorari in *O'Brien* on grounds of mootness, 409 U.S. 816 (1972), and explicitly declined to reach the merits, *see* 409 U.S. at 4. And *O'Brien* was not a case raising a § 5 claim in the first place. Moreover, *O'Brien* raised questions concerning "the deliberative processes of a national political convention," 409 U.S. at 5, a far cry from this case, which challenges only rules about whether formal participation in a state nominating convention of otherwise qualified voters can be restricted based on their ability or willingness to pay. Similarly, appellees repeatedly assert that appellants seek "a ruling that no court has ever made," Motion to Dismiss at 5, without mentioning that the RPV's imposition of a nonwaivable fee to participate in its statewide nominating proceedings is unique. The RPV draws an inappropriate inference from the fact that no other court has invalidated a practice no other party has had the effrontery to attempt.

would be unconstitutional. *See* Motion at 9-10, 14. Merely to catalog the implications of this position demonstrate its lack of merit. Under the RPV's theory, if a political party decided to permit only whites to serve as delegates to its nominating convention, Congress could not reach that racist policy. Similarly, if a political party decided to charge white voters $45 and black voters $100 to serve as delegates to a state convention called to nominate a candidate for federal office, Congress would again be unable to protect the political rights of black citizens. Clearly, the RPV is unwilling to push its argument to this conclusion, as its lip service to *Smith v. Allwright* and *Terry v. Adams* shows. But if such blatantly racist changes would be covered by § 5, then the fee challenged in this lawsuit is covered as well, because the only question in a § 5 coverage lawsuit like this one is whether the challenged practice involves a change with respect to voting, *not* whether the change has a discriminatory purpose or effect. *See, e.g., NAACP v. Hampton County*, 470 U.S. 166, 180-81 (1985) (even changes "undertaken in good faith" or which seem to be "an improvement over prior voting procedures" require preclearance, since "it is not our province, nor that of the District Court below, to determine whether the changes ... in fact resulted in impairment of the right to vote, or whether they were intended to have that effect. That task is reserved by statute to the Attorney General or to the District Court for the District of Columbia."); *Perkins v. Matthews*, 400 U.S. 379, 386 (1971) (same). Given that the current fee involves a change from the practice in effect as of § 5's coverage date, preclearance is required.

III. Private Parties Can Bring Actions Under Section 10

Contrary to the RPV's somewhat tortuous argument, nothing in § 10 of the Voting Rights Act establishes the Attorney General as the sole possessor of a right of action for

relief of voters from unconstitutional poll taxes. *See* Juris. St. at 19-22.

The RPV argues that because at the time of adoption of the Act in 1965 this Court had not yet decided *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), and accordingly not all state-imposed poll taxes had yet been held unconstitutional, discretion was vested in the Attorney General to attack certain poll taxes, and this discretion is incompatible with the existence of a private right of action. The sole source for this somewhat convoluted argument is a statement in Justice Harlan's *dissent* in *Harper* that congressional power to outlaw the poll tax was left undecided. Nothing in this argument provides any reason to believe that Congress intended to prevent voters from using the Voting Rights Act to vindicate their own rights under § 10. Here, as elsewhere, the RPV's argument proves too much. It would suggest that the Attorney General's similar discretion to bring § 2 and § 5 lawsuits likewise precludes private rights of action under those sections. Yet if anything is settled law, it is that private parties may bring actions to enforce those sections. *See, e.g. Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994); *Allen v. State Board of Elections*, 393 U.S. 544 (1969). Primary enforcement of the Voting Rights Act has always been vested in private parties.

IV. This Case Is Not Moot

The RPV asserts that this case is moot because the convention has now occurred, and there is no further controversy. Since the Party and its local affiliates collected considerably more than $500,000 in such fees, including $45 from appellant Morse, it is not entirely surprising that they now proclaim that the game is over and everyone should go home. At the most basic level, this case cannot be moot as long as the Party retains the fee it collected from appellant

Morse. The complaint explicitly sought an order requiring the Party to refund the fee, *see* Complaint, Requested Relief ¶ 9, and the retention of that fee remains in controversy.[5]

The Party also, and remarkably, suggests that appellants' request for permanent injunctive relief is moot because "[i]n the future the Party could abolish the fee, increase it, decrease it, *or make it waivable as suggested by the Law Students*." Motion to Dismiss at 20 (emphasis added). The Party asserts that it has consistently imposed *some* fee at its conventions, has repeatedly raised the fee, and will continue to impose such a fee. *See* Affidavit of David S. Johnson, Executive Director of the RPV ¶¶ 11, 20. *Any* change -- abolishing, increasing, decreasing, or waiving the fee -- requires preclearance. *See Hampton County*, 470 U.S. at 180.

The RPV's argument makes clear that this case falls squarely within this Court's long-standing doctrine that cases challenging electoral practices and procedures are not rendered moot by the occurrence of an individual election or nomination, because they are "capable of repetition, yet evading review .... [as long as] the laws in question remain on the books," *Dunn*, 405 U.S. at 333 n. 2 (internal quotations omitted). *See also, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 784 n. 3 (1983); *Storer v. Brown*, 415 U.S. 727, 737 n. 8 (1974); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n. 5 (1973). Ad hoc rules are "peculiarly" subject to

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[5] In any event, even if this Court were to conclude that this case is moot despite the Party's collection and retention of an illegally imposed fee, the proper course is not to affirm the judgment below, leaving a clearly erroneous precedent on the books. Instead, the judgment of the court below should be vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). *See, e.g., Harris v. City of Birmingham*, 112 S.Ct. 2986 (1992).

this problem because of "the very speed" with which they are announced and conducted. *Montano v. Lefkowitz*, 575 F.2d 378, 382 (2d Cir. 1978) (Friendly, J.). The RPV suggests that this case could have been litigated from complaint to final disposition by this Court if only appellants had filed their complaint on December 16, 1993, the very day the RPV issued its call for a convention. Motion at 20. That claim is factually ridiculous, as even a brief consideration of this Court's schedule shows. The RPV's suggestion is also legally irrelevant. Appellants' complaint alleged a series of statutory and constitutional violations by the RPV and another defendant over the course of the campaign. Appellants brought their lawsuit in a timely fashion, after reasonable and necessary investigation. Contrary to the RPV's contention, the justiciability of appellants' claims does not depend on the date on which its convention was called.

CONCLUSION

The district court seriously erred in interpreting §§ 5 and 10 of the Voting Rights Act, and its judgment must be reversed.

Respectfully submitted,

PAMELA S. KARLAN
Counsel of Record
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4614/1110 (Fax)

GEORGE A. RUTHERGLEN
580 Massie Road
Charlottesville, VA 22903
(804) 924-7015/7536 (Fax)

EBEN MOGLEN
Columbia Law School
435 West 116th Street
New York, NY 10027
(212) 854-8382/7946 (Fax)

DANIEL R. ORTIZ
University of Southern
California Law Center
University Park
Los Angeles, CA 90089
(213) 740-2559/5502(Fax)

Attorneys for Appellants